UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 15, 2006
E-49-E

No. 06-2943

COUNCIL TREE COMMUNICATIONS, INC., et al.,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

CTIA-WIRELESS ASSOCIATION, et al.,
Intervenors
(FCC Nos. 06-52, 06-71 & 06-78)

Present: RENDELL, AMBRO and NYGAARD, Circuit Judges.

1) Emergency Motion by Petitioners, Council Tree Communications, Inc., et al., for Stay Pending Review, with appendix in support.

2) Exhibits (Two Volumes) in Support of Emergency Motion by Petitioners, Council Tree Communications, Inc., et al., for Stay Pending Review.

3) Response by Intervenors-Respondents, CTIA-Wireless Association and T-Mobile USA, Inc., in Opposition to Petitioners' Emergency Motion for for Stay Pending Review.

4) Response by Respondent, Federal Communications Commission, in Opposition to Petitioners' Emergency Motion for Stay Pending Review.

5) Consolidated Reply by Petitioners, Council Tree Communications, Inc., et al., to Response in Opposition by Respondent, Federal Communications Commission, and to Response in Opposition by Intervenors-Respondents, CTIA-Wireless Association, et al.

/s/ Gayle Burr
Gayle Burr 267-299-4921
Case Manager

Hearing held 6/28/06.

O R D E R

PER CURIAM.

Petitioners Council Tree Communications, Inc., Bethel Native Corporation and the Minority Media and Telecommunications Council move for an emergency stay, pending judicial review, of (i) the effectiveness of regulations that the Federal Communications Commission adopted in its *Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 06-52 (Apr. 25, 2006) ("*Second Order*"), and clarified in its *Order on Reconsideration of the Second Report and Order*, FCC 06-78 (June 2, 2006) ("*Reconsideration Order*"), and (ii) the FCC's auction of Advanced Wireless Services licenses ("Auction 66"), currently scheduled to begin on August 9, 2006. For the reasons that follow, we will deny the motion.

I.

The rules adopted in the *Second Order* and *Reconsideration Order* govern eligibility for "designated entity" ("DE") benefits in FCC competitive bidding processes, including Auction 66. FCC regulations define DEs as "small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies." 47 C.F.R. § 1.2110(a). The Communications Act directs the FCC to establish a system of competitive bidding for use in granting spectrum licenses such as the Advanced Wireless System licenses that are the subject of Auction 66. 47 U.S.C. § 309(j)(1). The Act requires the FCC, in designing the competitive bidding process, to "include safeguards to protect the public interest in the use of the spectrum," *id.* § 309(j)(3), and to "ensure" that DEs are "given the opportunity to participate in the provision of spectrum-based services," *id.* § 309(j)(4)(D).

To give effect to this statutory mandate, the FCC has, over time, adopted a system of awarding bidding credits to DEs who participate in FCC auctions. This system entitles qualified DEs to a discount of 15 or 25 percent (depending on the DE's size) of a winning auction bid. Before the *Second Order*, the FCC attempted to prevent abuses of the system by (i) regulating the eligibility criteria for participation in the DE program, particularly by determining the circumstances in which the revenues of affiliated parties will be attributed to a DE for eligibility purposes, *see* 47 C.F.R. § 1.2110(b), and (ii) adopting unjust enrichment rules that require DEs that lose their eligibility, or assign or transfer their licenses, within five years after the auction to repay all or a graduated portion of the bidding credit, plus interest, to the government.

The FCC adopted the *Second Order* on April, 25, 2006, following its receipt and review of comments on its *Further Notice of Proposed Rule Making*, FCC 06-8 (Feb. 3, 2006) ("*Further Notice*"). The *Further Notice* had proposed modifying the DE benefit

eligibility rules to restrict the award of DE benefits to otherwise qualified applicants that have "material relationships" with "large in-region incumbent wireless providers." The Commission noted in the *Further Notice* that it had "reach[ed] a tentative conclusion" that such modifications were warranted. It sought comments on the elements of such a restriction and, more generally, as to whether the restrictions should be expanded further to include "material relationships" with all "large entit[ies] that ha[ve] a significant interest in communications services." *Further Notice* ¶ 1. The Commission also sought comments on whether it should modify its unjust enrichment rules in conjunction with any changes to the substantive eligibility rules. *Id.* ¶ 20.

In the *Second Order*, the FCC did not adopt the rule proposed in the *Further Notice*, but instead revised the DE eligibility rules "to limit the award of designated entity benefits . . . to any applicant or licensee that has 'impermissible material relationships' or an 'attributable material relationship' . . . with one or more other entities for the lease or resale (including under a wholesale arrangement) of its spectrum capacity." *Second Order* ¶ 3. It also made several revisions to the unjust enrichment rules, including changing the time frame over which unjust enrichment penalties would apply from five to ten years. *Id.* ¶ 37.

Petitioners moved the FCC for reconsideration of the *Second Order*. On June 2, 2006, the FCC issued the *Reconsideration Order*. Although the Commission "t[ook] note" that Petitioners' motion and the opposition to their motion filed by Intervenors here, CTIA–The Wireless Association and T-Mobile USA, Inc., were pending before it, it declined to formally rule on the motion. *Reconsideration Order* ¶ 6. Instead, it stated that it was acting "[o]n [its] own motion." *Id.* ¶ 7. However, the *Reconsideration Order* effectively addressed the merits of Petitioners' claims. *See id.* ¶¶ 9-12 (rejecting Petitioners' claims that the new rules violated the FCC's statutory obligations under 47 U.S.C. § 309(j)); ¶¶ 16-21 (dismissing Petitioners' claim that the *Second Order*'s restrictions on the leasing and sale of spectrum violated the Administrative Procedure Act's notice-and-comment provisions); ¶¶ 32-35 (dismissing Petitioners' claim that the *Second Order*'s revisions to the unjust enrichment rules violated the APA's notice-and-comment provisions); ¶¶ 39-40 (addressing, and rejecting, Petitioners' claims that the new unjust enrichment rules limited DEs' access to capital).

II.

We have jurisdiction to consider the emergency motion pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). In the ordinary case, "the pendency of [a] reconsideration petition deprives the agency decision of finality and thus puts it beyond our present ability to review." *West Penn Power Co. v. EPA*, 860 F.2d 581, 583 (3d Cir. 1988). However, the "requirement of administrative finality" is to be "interpreted pragmatically . . ., focusing on whether judicial review at the time will disrupt the

administrative process." *Bell v. New Jersey*, 461 U.S. 773, 779 (1983). As we stated in *West Penn Power*: "In policy terms the question is whether the obvious potential for duplication or wasted effort is outweighed by countervailing considerations." 860 F.2d at 586.

In this case, although Petitioners' reconsideration motion technically remains pending before the FCC, the *Reconsideration Order* effectively disposed of that motion on the merits. Because the administrative process has, *de facto*, run its course, we conclude that the *Reconsideration Order* represents the FCC's "final order[]" on the issues before us, and that our exercise of jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) is accordingly proper.

In any event, we note that we retain power to stay the FCC's orders and the auction in aid of our prospective jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a):

> The All Writs Act is . . . applicable in instances where a court that would have full appellate jurisdiction after the administrative reconsideration process is completed, is presented with an irreparable injury sustained because an agency order has been made effective pending reconsideration, the Act being employed in aid of jurisdiction to prevent even temporary immunity from judicial scrutiny of agency actions before statutory review provisions become available.

Am. Pub. Gas Ass'n v. Fed. Power Comm'n, 543 F.2d 356, 358 (D.C. Cir. 1976).

III.

In deciding whether to grant a stay, we consider the following four factors:

1. Whether the petitioners have made a strong showing that they are likely to prevail on the merits of their petition for review;

2. Whether the petitioners have shown that without such relief they will be irreparably harmed;

3. Whether the issuance of a stay would substantially harm other parties interested in the proceedings; and

4. Whether the issuance of a stay is in the public interest.

See Parker v. Penn Cent. Transp. Co. (*In re Penn Cent. Transp. Co.*), 457 F.2d 381, 384-85 (3d Cir. 1972).

We deny Petitioners' motion because we conclude, first, that Petitioners have not established that a stay is necessary to prevent irreparable harm and, second, that a stay is decidedly contrary to the public interest. We address only these prongs of the test; our confidence in our assessment of these two issues makes it unnecessary for us to consider Petitioners' likelihood of success on the merits of their petition for review.[1]

To establish irreparable injury warranting a stay, Petitioners must establish that the injury that they are likely to suffer is "both certain and great," and "actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Petitioners have not made a sufficient showing in this case. Their claim that they will be irreparably harmed in the absence of a stay rests in large part on predictive assessments of the likely effect of the new rules. *See, e.g.*, Decl. of David Honig, Executive Director, Minority Media and Telecommunications Council, at 2 ¶ 5 (June 6, 2006) ("The unintended consequence of imposing this dramatic a rule change that close to the auction date would be to freeze out most designated entities from participation in Auction 66."). Such "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Wisconsin Gas*, 758 F.2d at 674.

In this case, Petitioners have not demonstrated that the harm that they allege, *i.e.*, that the rules will bar them from participating in Auction 66, will in fact occur. We have no assurances that Petitioners have tried, and failed, to obtain replacement sources of capital under the new rules. Nor do we have any evidence from potential equity or debt investors that the rule change has in fact made their investment in DEs unwise or unprofitable.[2] In fact, the evidence that we do have indicates that DEs other than

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[1]We share Petitioners' concern that the *Further Notice* may not have sufficiently apprised interested parties that the Commission was contemplating changes in the DE eligibility and unjust enrichment rules of the sort that it ultimately adopted in the *Second Order*. However, this is a complicated question, as to which we form no opinion. We leave its resolution up to the panel that considers the petition for review, which remains pending.

[2]Assertions by the Petitioners and others that the new unjust enrichment rules are incompatible with the investment horizons of venture capital and private equity investors, *see, e.g.*, Decl. of Dr. Ronald J. Rizzuto, Professor, Department of Finance, Daniels College of Business, University of Denver at 3-4 ¶ 5-6 (May 4, 2006), are similarly unavailing. Private equity and venture capital investors represent only one source (albeit a significant one) of capital for DEs. For example, as Council Tree represented in its comments to the *Further Notice*, other "'entities with significant interests in communications services'" also serve as "valuable sources of capital" for DEs. Comments of Council Tree, WT Docket No. 05-211, filed with the FCC Feb. 24,

petitioners have successfully adapted to, and secured financing under, the new regulatory regime. Out of a total of 252 parties that filed short-form applications to participate in Auction 66 by the June 19, 2006 deadline, 166 parties claimed DE status. The Commission requires all applicants to certify that they are "legally, technically, *financially* and otherwise qualified" to participate in the auction. 47 C.F.R. § 1.2105(a)(2)(v) (emphasis added). In light of these facts, we assume that these DEs have secured financing that will enable them to participate, and find unpersuasive Petitioners' claim that DEs have been "locked out" of Auction 66 as a result of the rule changes promulgated in the *Second Order*.

The public interest also militates strongly in favor of letting the auction proceed without altering the rules of the game at this late date. As the FCC and the Intervenors note, this auction represents the culmination of an 18-month process of relocating government users from the spectrum that is the subject of Auction 66, and will advance the public interest by helping to modernize the nation's broadband infrastructure, which "lags dramatically behind other industrialized nations." Statement of Commissioner Michael J. Copps, *Reconsideration Order*, FCC 06-78, at 26. All of the parties, including Petitioners, that have spoken on this issue have emphasized the importance of proceeding with the auction this summer. *See, e.g.*, Comments of Council Tree, WT Docket No. 05-211, filed with the FCC Feb. 24, 2006, at 61 ("[T]he auction of AWS-1 licenses is a critical opportunity for smaller carriers and new entrants to acquire access to vital spectrum resources. It will be the first such major opportunity in many years, and that opportunity should not be delayed."); Statement of Commissioner Michael J. Copps, *Further Notice*, FCC 06-8, at 23 ("I am committed to sticking to our schedule for the AWS auction. . . . The AWS auction will be one of our largest in years. We need not delay this auction — which holds great promise for bringing new wireless services to American consumers."). Finally, as noted above, it appears that DEs other than Petitioners have adjusted to the new rules and will participate.

2006, at 40. Yet Petitioners have made no attempt to demonstrate that the new rules have affected their ability to obtain financing from media companies or other alternate funding sources. In this context, the harm that Petitioners are seeking to avoid appears to be more a function of their own business plans than of the rules adopted in the *Second Order*. We may not grant their motion for a stay on this basis, as "the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin." *Wisconsin Gas*, 758 F.2d at 674.

IV.

For the foregoing reasons, we hereby DENY Petitioners' emergency motion for stay pending review.

Dated: June 29, 2006
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